

# Dalhousie Law Journal

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Volume 7 | Issue 2

Article 2

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4-1-1983

## International Law and the Control of Terrorism

L. C. Green

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### Recommended Citation

L. C. Green, "International Law and the Control of Terrorism" (1982-1983) 7:2 DLJ 236.

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Any discussion of terrorism whether it affects the interests of a single country or those of more than one immediately involves problems of definition. According to the *Oxford English Dictionary*, for example, terrorism is defined as "1. Government by intimidation as directed and carried out by the party in power in France during the Revolution of 1789-1794; the system of the 'Terror'; 2. A policy intended to strike with terror those against whom it is adopted; the employment of methods of intimidation; the fact of terrorizing or condition of being terrorized." The English statute passed in connection with the 'troubles' in Ireland - Northern Ireland (Emergency Provisions) Act, 1978<sup>1</sup> - is only slightly more helpful, for it defines terrorism as "the use of violence for political ends and includes any use of violence for the purpose of putting the public or any section of the public in fear."

The primary Dictionary definition reflects the political atmosphere of the time of its compilation and the views of those living in a democratic state, for in the nineteenth century the principal concern of libertarians was condemnation of authoritarian regimes and their denial of human dignity. As concerns terrorist acts by individuals acting on their own or on behalf of some political movement, the general tendency was to regard those who were seeking to overthrow autocratic regimes as political heroes, and those whose targets were friendly or non-authoritarian governments as anarchists. The second Dictionary definition is wide enough to cover not only intimidation and terror perpetrated by governments, but also by individual offenders. In this it is similar to the English definition. If this is considered in the light of the Northern Ireland situation, it is of limited and specific application. But if taken instead as a general definition, it does not necessarily include government actions, although a terrorist act committed on behalf of a foreign government within England would fall within it. But primarily the definition would apply to acts of individuals, (perhaps even including the

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\* L. C. Green, LL.B., LL.D., F.R.S.C., University Professor, University of Alberta.

1. 1978, c. 5, s. 31; see also, Prevention of Terrorism (Temporary Provisions) Act 1976, c. 8, s. 14 (1).

private kidnapper,) or of groups seeking to achieve some end of their own, be it monetary, ideological or political. The trouble with this type of definition is that if it is tied to 'political ends', as is the English statute, efforts are rarely made to define what is meant by this, nor is any attempt usually made to distinguish between the truly politically motivated act and the 'crank' seeking international recognition, or the private assassin asserting that his activities are directed to political ends. In fact, a definition of this kind is perhaps wide enough to cover individual threats or single acts of kidnapping by a self deluded 'Lenin'.

If one looks at the problem of state-directed terror, whether it be of the kind that is perpetrated by military régimes in, for example, South America, or whether it is the 'knock-in-the-night' type of Stalin's Russia or Nazi Germany, it soon becomes clear that this does not arouse the feelings of the public or the media nearly to the same extent as does the isolated act of a private group. And when the public is aroused by such acts of state terrorism, it tends to sympathise with any rebel movement seeking to overthrow such a tyranny, provided that the political temper of the rebel movement is not anathema to the public concerned. If, on the other hand, the media or government propaganda depict the rebels as nothing but murderers restrained by a government seeking to maintain order and to introduce, so it is asserted, a democratic régime when practical, then the sympathies of the masses not involved in the actual dispute tend to shift. The attitude of governments to such official acts of terror is that the remedy lies through pressure arising from international commitments in the field of human rights, even though the levels of coercion or enforcement in this area are, for the most part, non-existent, or lie solely in the form of verbal condemnation. Moreover, those states which sympathise with the government involved will describe its 'friend' as upholding 'our' interests, while the rebels will be described as 'terrorists' lumped together with the most obscene of terrorist groups and condemned as tools and surrogates of, for example, 'the Soviet threat to democracy'. The foreign policy of the Reagan administration best exemplifies this latter situation.

In view of this attitude to state terrorism, it is perhaps not surprising that the media and other manifestations of public opinion emphasise individual terrorist activities, particularly as the acts of governments are directed against their own nationals within their own territory which do not affect the immediate interests of aliens. Moreover, even democratic governments tend to play down criticism of the acts of foreign authorities<sup>2</sup> since they are concerned not to open

the way for any foreign government to criticise their actions. The acts of individual terrorists are frequently directed against foreign nationals or take place in foreign territory, which would automatically receive international press coverage. At the same time, in view of the vast increase that has taken place in international travel the observer readily sees himself among the potential victims. Again, it must be borne in mind that it is rare for states to be unquestionably proven to have inspired or to have taken part in acts of terrorism outside their own territory, although there was strong evidence that this was in fact the case when Alexander of Yugoslavia and Barthou, the French Foreign Minister, were murdered by Croatian terrorists/patriots at Marseilles in 1934, allegedly with the support of the Hungarian Government.<sup>3</sup> More recently, a number of governments, including that of the United Kingdom, have alleged that Libyan refugees in their countries have been murdered by Libyan terrorists on the instructions and with the active support of the local Libyan ambassador. This view finds some support in statements made by President Gaddafi calling for the extermination of enemies of his régime wherever they may be.<sup>4</sup>

The activities of terrorists express themselves in a variety of ways, including the despatch of explosive materials through the mails, destruction of public buildings, attacks against cultural institutions, kidnapping of government and business officials, assassination of eminent persons, the seizure of schools with their children, hijackings of the means of transport (particularly aircraft), attacks against industrial establishments, violence against diplomats and embassies, and so on. To attempt to provide a comprehensive list is self-defeating. On the other hand technology is as readily available to terrorists as it is to those seeking to frustrate their activities; second, any list tends to be regarded as exhaustive, leading to assertions that if a particular act has not been condemned as terrorist it cannot be regarded as such. As a result, when attempts are made to condemn terrorist acts and to designate them criminal by way of an international instrument, the general practice nowadays is to abandon the search for a comprehen-

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2. Perhaps the worst example of this was the pre-1939 attitude of the British government towards Nazi atrocities in Germany, which were not officially exposed or condemned until after the outbreak of war, Germany No. 2 (1939), "Papers concerning the Treatment of German Nationals in Germany, 1938-39", Cmd. 6120 (1939).

3. See, e.g., League of Nations Council debate, Nov./Dec. 1934, 1 Friedlander, *Terrorism - Documents of International and Local Control*, (1979), at 217; Toynbee, *Survey of International Affairs 1934*, (1935), at 566-573.

4. *The Times* (London), 13, 14 Jun. 17 Sept. 1980; for similar problems affecting the Federal Republic of Germany, *Id.*, 16 Sept. 1980.

sive treaty condemning terrorism as such. Instead, the tendency is to seek out a particular type of terrorism, such as acts of violence against aircraft or diplomats or the taking of hostages, and draft a text regarding this type of activity in the hope that it will be generally acceptable to governments. Such a project is perhaps more realistic than a comprehensive treaty, and it leaves the way open for action which may be stimulated when some particular act of terrorism arouses general condemnation.

While it may be difficult to define terrorism or to prepare a comprehensive list of all such acts, it is probably true to say that the public at large can 'smell' terrorism when it occurs. The trouble is, however, that one man's terrorist is another man's patriot.<sup>5</sup> Also, not every one is terrorized by the same action. The very idea of terrorization depends on subjective reaction and, as a result, we find that the definitions of terrorism reflect the fears of whoever puts them forward. For example, in time of war, belligerents frequently resort to means of fighting which terrorize those against whom they are directed. And this is even true of organized offensive acts normally regarded as legitimate, even though they might strictly be contrary to the rules of the law of armed conflict. Thus the victims of city bombing are in fact terrorized, but such action does not fall within the concept of terrorism as it is understood today. This means that many of the acts that take place between belligerents which are described as acts of terrorism, as was, for instance, the taking of hostages during the Second World War, should be more correctly treated as war crimes.<sup>6</sup> This is true even of acts which are intended to terrorize a military unit or a civil population. Thus, an attack by an armed force or by infiltrators engaged in an armed conflict - even if it be one that does not strictly amount to war in the normally recognized sense of that word - such as an armed attack against a village, hospital or school, while it may be regarded by the persons against whom it is directed or the government whose policy it is intended to affect as an act of terrorism, should nevertheless be distinguished from such acts and treated, depending on the circumstances, either as an offence against the local criminal law or the law of war. Such acts are perhaps more frequently committed during a non-international

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5. See, e.g., Harrington, *Epigrams of Treason*, (1618), "Treason doth never prosper; what's the reason? Why, if it prosper, none dare call it treason"; see also, Montesquieu, *Persian Letters*, (1721), tr. Healy, (1964), at 174.

6. See, e.g., *U.S. v. List* (The Hostages Case) (1948) U.N. War Crimes Commission, 8 *Law Reports of Trials of War Criminals* 34, 76; see also, Schwarzenberger, 2 *International Law, The Law of Armed Conflict*, (1968), ch. 17.

than an international conflict, as for example during a civil war or during such phenomena as that in Northern Ireland. It is true that many of the acts of violence committed in that territory are intended to terrorize the population or part thereof, or to bring pressure upon the authorities in order to secure some concession or other. However, since acts of this kind do not normally affect the interests of any country other than that directly involved, they do not constitute acts with which international law is concerned, but remain to be dealt with under the local criminal law. The fact that the government, the people or the law in question may describe such acts as terrorism does not make them so in the eyes of international law. When, however, the violence escapes from, for example, Northern Ireland, so that the interests of some state other than Ireland or the United Kingdom becomes affected, the situation changes. Thus, if a British diplomatic representative abroad is attacked by some Irish activist, or a British military base in Germany is bombed, then international law becomes concerned, for the peace and security of a non-involved state has been brought into issue.

A somewhat similar situation prevails in regard to armed conflict. While the acts of violence or terror remain geographically confined to the area of hostilities and are not intentionally directed against nationals of states not participating in such hostilities, third states are not involved, other than seeking to restore peace or preserve some semblance of humanity in so far as the treatment of non-combatants may be concerned. However, even though one of the parties to such a conflict condemns the acts as terrorist, and while there may be no actual war being fought between, for example, the State of Israel and its Arab opponents (whether such opponents be neighbouring states or elements of some Palestinian 'Liberation' Movement), provided that the activities in question remain within the territories of the parties involved in that conflict and are directed against the nationals of those parties, the situation does not amount to terrorism as that word is now technically employed. The fact that public opinion or Israeli law may apply such terms to acts of this kind does not alter the situation. The acts become terrorist from the point of view of international interest when the rights of a non-partisan are affected. Thus, acts of violence committed against civilians by Palestinian or Israeli activists in Israel or some Arab territory should, even though they are intended to terrorize the population or government affected, and even though the rest of the world condemns them as terrorist, nevertheless be treated as crimes according to the law of the country in which committed or as war crimes. They are not terrorist as

understood by international law. The latter becomes concerned when, for example, the operations take place outside the affected territories or are directed against, perhaps, a foreign embassy within those territories in the hope that the country of the latter may be induced to change its policy *vis-à-vis* the Middle East hostilities, or be persuaded to apply pressure to the belligerents for some concession. Equally, if an Israeli embassy in Bangkok is attacked, or an Arab agent in Paris or Oslo is murdered, the situation changes. The involvement of Thailand, or France or Norway as a victim changes the nature of the act committed from that of, at most, a war crime, to one of international terrorism.

Perhaps the clearest instance of this distinction between national or internal and international terrorism is to be found in the Québec crisis of October 1970. A separatist political cell kidnapped a member of the Québec government with the aim of applying pressure to both the provincial and federal governments. Another separatist group kidnapped the British Trade Commissioner with the same purpose, anticipating that the desire to keep British friendship would persuade the Canadian authorities to compromise to secure the diplomat's freedom, or in the hope that Britain would apply pressure to the Canadian government to effect some compromise to this end. In fact, the provincial, federal and imperial governments all refused to make concessions of any kind, and while the Québec politician was murdered the British diplomat was eventually released. The first kidnapping was entirely and exclusively a Canadian matter, while the second not only raised issues affecting the interests of Britain, a country completely outside the Canada-Québec separatist issue, but also matters touching upon one of the most sacred and ancient of international law<sup>6a</sup> principles, that concerning the safety and immunity of diplomats.

International law is traditionally not concerned with matters which only touch the interests and affairs of a single state. It becomes a matter of international law when, directly or indirectly, the interests of a third state are affected, either in its territory, its nationals or its representatives. In the nineteenth century, even though acts of terrorism were by no means uncommon, they tended to be confined to the territory of the government against which they were directed and foreign states only became interested if the alleged terrorist sought refuge within their territories. At that time, most acts of terrorism

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6a. See, e.g. Green, "Trends in the Law Concerning Diplomats" (1981) 19 *Canadian Yearbook of International Law*, 132 at 132-141.

were directed against autocratic rulers and the practice grew among European states of providing asylum to offenders guilty of 'political offences'. Such offences were narrowly defined so as virtually to exclude the intent of the offender and to look more to the purpose of his act. A political offence was defined as one committed as part and parcel of and during an organized attempt to overthrow a political system.<sup>7</sup> Such a definition clearly reflects the liberal *laissez faire* philosophy and represents an approach based upon the haves and the have-nots of political power. As a result, the individual offender committing some act of terrorism motivated by political hatred of the victim of the system, but not directed to overthrowing the government and replacing it by some other organized system, was not recognized as being entitled to immunity from extradition because of the political character of his offence.<sup>7a</sup> This denial of immunity bore heavily upon anarchists, who were regarded as the enemies of all systems of government and so outside the definition as just expounded.<sup>8</sup> There was, however, one further exception. Most countries refused to regard as political offenders any terrorist whose act of violence was directed against a head of state.

While there were some efforts to secure international co-operation against anarchists and regicides on a limited scale,<sup>9</sup> it was this type of terrorist act that first found condemnation in what was intended to be an international instrument of general application. After the assassination of Alexander and Barthou, the League of Nations directed itself to the need to declare such acts of terrorism a crime under international law. In 1937 the League adopted a Convention for the Prevention and Punishment of Terrorism<sup>10</sup> which reaffirmed,

"the principle of international law in virtue of which it is the duty of every State to refrain from any act designed to encourage terrorist activities directed against another State and to prevent the acts in which such activities take shape . . . . 'Acts of terrorism' means criminal acts directed against a State and intended or calculated to create a state of terror in the minds of particular persons, or a group of persons or the general public."

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7. *Re Castioni* [1891] 1 Q. B. 149; see also, *Re Federenko* (1910) 17 C.C.C. 268; *Re Commonwealth of Puerto Rico and Hernandez* (1972) 30 D.L.R. (3d) 260, 613; *Re State of Wisconsin and Armstrong* (1972) 28 D.L.R. (3d) 513, 30 *id.* 527.

7a. See also, Green, "Terrorism and the Courts" (1981) 11 *Manitoba Law Journal*, 333.

8. *Re Meunier* [1894] 2 Q.B. 415.

9. E.g., St. Petersburg Protocol 1904, (10 Martens, N.R.G. (3d Ser.) 81); South American Police Convention, 1920, (1 Hudson, International Legislation 448); Quito Agreement re Mutual Defence against Undesirables (7 *id.* 166).

10. *Id.* 862.



The Convention then went on to specify certain acts if committed with this purpose, and required the parties to the treaty to make such acts criminal if they were not already treated as such by the national law. Chief of these was wilfully causing death or grievous bodily harm or loss of liberty to heads of State or their designated or hereditary successors, their spouses and persons charged with public functions or holding public positions when the acts are directed against them in their public capacity. It is doubtful whether this definition would have covered the assassinations of Robert Kennedy, Martin Luther King or Malcolm X, for none of these was holding a public function with the act directed against him in that public capacity. If President Kennedy or Reagan had been shot in a personal vendetta, as certainly seems to have been the case with the latter, the same would be true. As to the attack on the Pope, there is not yet sufficient evidence to be certain whether it would have fallen within the League definition. The Convention also forbids wilful destruction or damage to public property or any wilful act calculated to endanger the lives of members of the public, together with the manufacture or supplying of arms, explosives or other harmful substances intended to be used for terrorist purposes in any country. The Convention also called for the regulation of fire-arms, other than smooth-bore sporting guns, and declared the alteration of passports or the possession or use thereof to be punishable offences. It recognized that national criminal codes would have to be amended and sought to ensure that those accused of terrorism would not be exempt from extradition. But even though all the members of the League were willing to condemn terrorism in debate, the Convention was signed by only 23 League members; and the only member of the British Commonwealth to sign was the Empire of India, which was the sole ratifying country. As a result, the treaty never came into effect.<sup>11</sup> The League was aware of the need to supplement national criminal jurisdiction, particularly as it might well be the case that an alleged terrorist sought asylum in a friendly country or one which found it embarrassing to prosecute him. Moreover, if international law is to have any meaning in a field of this kind so that what is described as an international crime may be measured by international as distinct from national criminal law, an international criminal tribunal must be established. This was understood by the League

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11. It is interesting to note that the Convention was drafted by a committee consisting of Eden (U.K.) as *rapporteur*, Aloisi (Italy) and Laval (France) (Walters, *A History of the League of Nations*, (1952), at 604-605). Of the three, only France signed.

of Nations, but the Statute for such a Court,<sup>12</sup> drawn up at the same time as the Terrorism Convention, only received thirteen signatures, with none of them coming from the Commonwealth, and with none of the signatories having ratified the Statute. To this day there is no criminal court, so that offences like piracy which are normally described as crimes against international law have to be tried by national criminal courts. This is equally true of war crimes, although after the Second World War special tribunals made up of the representatives of different countries were set up to try those who were described as the major war criminals in Europe and the Far East, while the minor war criminals were brought before military tribunals established by their captors.

International law is only concerned with issues affecting the interest of more than one country. In so far as terrorism is concerned this means that the act in question must in one way or another be transnational in character. Put in another way, a terrorist from or acting on behalf of country A or on behalf of some political group would apply some form of violence or threat against the nationals, territory agreement or property of country B, in order to secure some concession from country A or C, or if the concession be sought from B, then the pressure would be applied against the nationals, territory, or property of country A or C.<sup>13</sup> In other words, an innocent third party is involved in some way or another. Among the earliest forms of terrorism of this kind to occur after the Second World War was the use of letter bombs sent through the mails. In accordance with the Universal Postal Convention<sup>14</sup> it is an offence to send explosives or other inflammable substances through the mails, but the question of punishment is left within the jurisdiction of member countries. There is no suggestion, for example, that those responsible for any such activity should be extradited to the country in which the explosion takes place.

Letter bombs, however destructive they may be, tend to be restricted in their scope of injury and are not as prone to arouse international public interest as some of the other acts of violence with which we have become familiar since 1945. If we look to the activities of such groups as the Italian Red Brigades, the Japanese Red Army,

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12. 7 Hudson, *op cit.* 878.

13. See Green, 'The Nature and Control of International Terrorism' (1974) 4 *Israel Yearbook on Human Rights*, 134 at 163-166.

14. 1964, U.S. T.I.A.S. 5881.

the Baader-Meinhof gang, the Latin American urban guerrilla groups, the South Moluccans in the Netherlands, or even the Irish Republican Army or the Ulster Defence Association,<sup>15</sup> even though their acts may arouse interest because of their scope, the personality of the victim, or the horror of the particular outrage, it nevertheless remains true that, for the most part, these acts are national in character, that is to say directed against a national personality and within the national territory. They only become important internationally if the offender escapes abroad when his extradition may be requested, or if he commits an act against a co-national in a foreign country when his act constitutes an offence against that country's criminal law. To a great extent the world is only aware of the occurrence of such 'local' acts because of the role played by the media.<sup>16</sup> When the act crosses the frontier there is an automatic arousal of interest which does not depend on news organs. Occasionally, a terrorist act, particularly one committed by an urban guerrilla group, is directed against an alien who is not an official of a foreign government. It would seem that this should be automatically an issue of international concern. However, care must be taken to assess whether the victim is, in truth, an innocent third party completely unconnected with the quarrel between the terrorist group and the true objective of its terrorist act—usually the local government. This problem has arisen frequently in Latin America when the victim of terrorism has been a foreign businessman, often a United States citizen, or a security adviser seconded by, for example, the Central Intelligence Organization to assist in the training of local security forces. In such circumstances, care must be taken to determine whether the victim is so closely identified with the local authorities on political, economic or security grounds, that this identification virtually makes him part of the establishment so that the terrorist act is, in reality, national rather than international in character. This in fact seems to have been the case of U.S. General Dozier kidnapped in Italy as a protest against the latter's foreign policy.

The terrorist acts which have aroused most public interest have been concerned with interference with international air traffic, by way of the hijacking of aircraft.<sup>17</sup> In so far as interference with

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15. An index of terrorist groups will be found in Dobson and Payne, *The Terrorists*, (1979), 159-201.

16. See, e.g., Schmid and de Graff, *Insurgent Terrorism and the Western News Media*, (1980), Miller, ed., *Terrorism, The Media and the Law* (1982).

17. See, e.g., Green, *Piracy of Aircraft and the Law*, (1972), 10 Alberta L.R. 72; Joyner, *Hijacking as an International Crime*, (1974), Mankiewicz, *Le détournement des avions*

non-international flight is concerned, the situation differs from normal internal terrorism and may be regarded as an act affecting international law, even though no interests of a third party are directly involved. There are but few countries which are not involved in international flight and all flights through national airspace, whether by internal or international carriers, have to be coordinated. If an aircraft is diverted during flight all other air traffic in the region is interfered with and may have to be terminated or deviated. If the diverted aircraft is about to make an unscheduled landing, all other aircraft using the airport involved are themselves affected. If rescue or interception aircraft are sent after the diverted plane, international traffic is even more seriously interfered with. If the diverted aircraft lands and those responsible for its hijacking threaten the security of the passengers or threaten to destroy the aircraft on the ground, the security of the airport and thus of all air traffic using that airport is equally endangered. However, the most 'glamorous' forms of aerial hijacking have been interferences with international air traffic with a terrorist group seizing, or otherwise endangering an aircraft belonging to one country, carrying nationals of a number of countries and making use of the landing facilities of yet another country. For the most part, these acts of terrorism have been carried out by various Palestinian groups associated with the Palestine Liberation Organization in connection with the Palestinian-Israeli conflict. On occasion, the purpose has been to secure publicity. On others, the aim has been to apply pressure to Israel to secure the release of other terrorists, either by applying threats against Israeli subjects or by seeking to bring pressure to bear from other states whose nationals may be endangered by the hijack.

Although international transportation of every kind is a matter of interest to all countries, the United Nations has not shown itself over-enthusiastic in dealing with the control or prevention of aerial hijacking. While that organization has been willing to issue a number of 'motherhood' resolutions paying lip-service to the condemnation of terrorism,<sup>18</sup> any attempt to put teeth or real meaning into such measures has been frustrated by political consideration. The United Nations, despite efforts by idealists, the media, and world-government-mongers, is not an entity with a life of its own. It is not and was never intended to be a parliament or lawmaking body for the world. It is nothing but a permanent diplomatic conference made up of the

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(1971), Rev.Fr. de Droit Aérien No. 4, 1; McWhinney, ed., *Aerial Piracy and International Law* (1971); McWhinney, *The Illegal Diversion of Aircraft and International Law* (1975).

18. E.g., Res. 3034 (XXVII): 31/103; 32/147; 34/145, adopted between 1972 and 1980.

representatives of states sent there by the political bodies that constitute the governments of the members, who reach political decisions on political issues in accordance with the political desires of their political masters.<sup>19</sup> As a result, the various attempts that have been made to secure effective action against terrorism have floundered on the fact that some of the members of the United Nations sympathise with such terrorist organizations as those affiliated to the Palestine Liberation Organization, while others like Libya<sup>20</sup> have not hesitated to finance all sorts of terrorist movements for its own political purposes, and still others have proved willing to offer hospitality to terrorists coming from particular areas, as occurred in the early years of aerial hijacking in the case of Cuban and American aerial terrorists.<sup>21</sup> In so far as the occasions for raising terrorism issues in the United Nations have related to the Middle East situation between Israel, the Arab states and the Palestinians, the attitude of the Arab states and the Third World generally has been to argue that it is more important to deal with the causes of terrorism than a particular act of terrorism. On the surface, this is of course an attractive argument. If one can eradicate the cause, then the consequence will not occur. However, this overlooks the fact that the Middle East situation, alleged to be the cause of such acts of terrorism, has been with us for some thirty years and it is hardly realistic to argue that terrorism affecting that area or the countries involved should not be considered until the basic political problem has been solved.

It is because of this difficulty that aerial hijacking has been dealt with through the medium of the International Civil Aviation Organization, even though not all countries are members and though, more recently, the Organization has taken what many may regard as a self-destructive step by giving consultative status to the Palestine Liberation Organization which has been responsible for so many of the hijackings. It is hardly realistic to plan steps against this menace in the presence of those responsible for it. As a result of the Tokyo, Hague and Montreal Conventions (1963, 1970 and 1971)<sup>22</sup>, the parties to those agreements have undertaken to make offences against aircraft, including deviation or hijacking, criminal offences

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19. See comments in advisory opinion on *Reparation for Injuries Suffered in Service of the United Nations* (Bernadotte) [1949] I.C.J. 174, 178-179.

20. See, e.g., Sterling, *The Terror Network*, (1981), ch. 14.

21. Eventually controlled by Exchange of Notes on Hijacking of Aircraft and Vessels and Other Offences between U.S. and Cuba, 12 I.L.M. 370; see also, similar Agreement between Canada and Cuba, Can.T.S. 1973/11.

22. 2 I.L.M. 1042; 10 *id.* 133, 1151.

triable by those countries affected by the hijacking or countries in which a hijacker is found. Such offences are not to be treated as political offences, but if the holding country decides not to proceed against the offender, an application for extradition by the demanding country is to be governed by the local law relating to extradition, thus opening the possibility for the courts hearing the application to decide that the offender is covered by this exception regardless of this provision. As is normal with treaties condemning particular acts as contrary to international law, there is no provision for the creation of a special tribunal. So once again we find that some countries, though parties to the Convention, as, for example Uganda at the time of the Entebbe incident, fail to take the measures called for. Because of the continuance of aerial offences despite the three Conventions, a group of States - Canada, the Federal German Republic, France, Italy, Japan, the United Kingdom and the United States - entered the Bonn Agreement undertaking to cut off aerial contact with countries giving asylum to aerial terrorists, or failing to proceed against or to extradite them when requested.<sup>23</sup> This Agreement might have some meaning if the countries concerned carried out such an undertaking. However, where some are concerned, such action might be construed as contrary to the freedom of trade and of contract and as such unconstitutional, while others do not fly to countries of asylum, e.g., Algiers, Libya, Yemen and Saudi Arabia, at any time.

It is because of the ineffectiveness of the ICAO agreements that individual countries have had to decide how to confront aerial terrorism directed against them or their nationals. In the case of the German rescue of passengers in the Lufthansa aircraft diverted to Mogadishu by its hijackers - 4 Palestinian terrorists - in 1977<sup>24</sup> and of the Indonesian rescue of passengers on a diverted Garuda plane at Bangkok in 1981,<sup>25</sup> no problems arise since these particular rescue efforts received the consent if not the active support of the authorities of the country to which the aircraft had been diverted. The situation was somewhat different with the Air France aircraft hijacked by a multinational group of terrorists to Entebbe, Uganda, in 1976. For the release of its passengers, freedom for a variety of detained terrorists was demanded. Regardless of any international obligation relat-

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23. 1978, 17 *id.*, 1073. In their 1981 affirmation of the Agreement they announced their intention to suspend flights to Afghanistan consequent upon the latter's treatment of the hijackers of a Pakistan International Airlines aircraft, 20 *id.* 956, though very few of them flew there anyway.

24. Geraghty, *Inside the SAS*, (1980), at 170-173.

25. *The Times* (London), 1 Apr. 1981.

ing to the safety of aliens,<sup>26</sup> the Ugandan authorities offered comfort to the terrorists and even assisted them in holding their prisoners. When it became clear that the terrorists were discriminating against the Israeli and Jewish passengers in their custody and threatening to murder them, and that the Ugandan authorities were not prepared to do anything to frustrate this exercise, the Israelis mounted a successful rescue operation in the course of which some Ugandan military personnel were killed and Ugandan aircraft destroyed. Far from condemning the terrorist act or the Ugandan complicity, an effort was made to secure United Nations condemnation of the Israeli operation as an act of aggression against Uganda, threatening its independence and international peace and security.<sup>27</sup> International law has always recognized the right of a state, when absolutely necessary, to take steps to preserve the lives of its nationals abroad. Moreover, aggression occurs when the security of the state against which action has been taken is threatened for the ulterior political motives of the state taking such action, and the Charter of the United Nations only forbids actions which are directed against the political independence or territorial integrity of the victim state.<sup>28</sup> In the Entebbe incident, the purpose of the Israeli raid was narrowly limited to the specific purpose of the rescue of the hostages. There was no intention on the part of Israel to occupy Uganda or undertake military operations against that country with a view to achieving its defeat or Israeli political ends, nor was there any intent to occupy the country, alter its territorial integrity or threaten its political independence. In fact, the operation was of short duration and terminated once the passengers were liberated. The Ugandan injuries were part and parcel of action necessary to the successful achievement of this limited purpose, for the military sought to frustrate the rescue, while the aircraft were destroyed in order to prevent pursuit. Far from being contrary to international law, the Israeli operation was in accordance with well-established principles of humanitarian intervention and self-help, and in no way contrary to the principles established in the Charter of the United Nations.<sup>29</sup> When the international community fails to uphold the rule of law it may well be that

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26. Lillich and Flaxman, *State Responsibility for Injuries to Aliens occasioned by Terrorist Activities*, (1977), 26 American Univ. L.R. 217.

27. The text of the proposed Resolutions and extracts from the Security Council debate will be found in 15 I.L.M. 1226-1234.

28. Art. 2(4).

29. See, e.g., Green, *Humanitarian Intervention - 1976 Version*, (1976), 24 Chitty's L.J. 217; *Rescue at Entebbe - Legal Aspects* (1976), 6 Israel Y.B. Human Rights 312.

this task falls upon the state, the invasion of whose rights amounts to a breach of the rule of law and all accepted principles of international morality and behaviour.

One of the favourite activities of urban guerrillas, whether in Latin America or Europe, has been to attack foreign embassies<sup>30</sup> or to seize foreign diplomatic personnel.<sup>31</sup> And this tactic has also been used by some of the Palestinian groups as well as by groups directing their anti-government activities through the medium of ambassadors, whether resident in the country of the terrorist group or abroad. Since diplomatic immunity and the protection of diplomats are among the oldest principles of international law, certainly reaching back into ancient Greece,<sup>32</sup> and since all countries are likely to be affected by such conduct, the political ideology which has been responsible for the attack tends to be ignored and states are inclined to regard an attack against one diplomat as being directed against the entire diplomatic corps.<sup>33</sup> It has therefore proved easier to secure United Nations action against such acts than it has been in regard to other terrorist activities. However, despite the general interest in upholding international law at least in those matters that affect every one of them, some members of the United Nations have proved determined to preserve their political ideology in support of such terrorist movements as might be described as operating in the name of national liberation and self-determination. The decision as to the identification of such movements is subjective and it is accepted in United Nations practice that a national liberation movement is one that is recognized as such by the regional organization in the area in which the movement is conducting its activities. This means, of course, that where there is no such organization or where the authority against which the movement is operating has the support of the majority of the members of the organization, the likelihood of recognizing the movement as one of national liberation is somewhat remote. It is unlikely, therefore, that the Irish Republican Army or the *Front de Libération du Québec* will receive such recognition. In fact, at the present time only the Palestine Liberation Organization, the South West Africa People's Organization and the [South] Afri-

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30. 48 embassies were taken over between 1971 and 1980, Jenkins, *Embassies under Siege*, 1981. There have been further instances since.

31. See Baumann, *The Diplomatic Kidnappings*, (1973).

32. See Phillipson, *The International Law and Custom of Ancient Greece and Rome*, (1911), vol. 1, at 328-337.

33. See reaction to arrest of Russian ambassador in London, 1708, 1 Blackstone, *Commentaries*, (10th ed., 1787, at 255.



can National Congress enjoy this status. These latter organizations are supported by the Third World and also by the members of the Communist bloc who can thus control an automatic majority in the United Nations. As a result, when the General Assembly adopted the Convention on Prevention and Punishment of Crimes against Internationally Protected Person, including Diplomatic Agents in December 1973,<sup>34</sup> it was very conscious of its Resolution on Measures to Prevent International Terrorism,<sup>35</sup> adopted a year earlier. While this Resolution condemned acts of international terrorism "which are occurring with increasing frequency and which take a toll of innocent lives," and recognized the need for international co-operation to prevent their occurrence and to study "their underlying causes with a view to finding just and peaceful solutions as quickly as possible," it nevertheless reaffirmed "the inalienable right to self-determination and independence of all people under colonial and racist régimes [which by reason of a Resolution of 1975<sup>36</sup> include Zionism and thus Israel as a 'Zionist State'] and other forms of alien domination and upholds the legitimacy of their struggle, in particular the struggle of national liberation movements . . . [and] condemn[ed] the continuation of repressive and terrorist acts by colonial, racist and alien régimes in denying peoples their legitimate right to self-determination and independence and other human rights and fundamental freedoms." These sentiments are not expressed in the 1973 Convention in any way, but the Convention is part of a General Assembly Resolution<sup>37</sup> which specifically states "that the provisions of the annexed Convention could not in any way prejudice the exercise of the legitimate right to self-determination and independence . . . by peoples struggling against colonialism, alien domination, foreign occupation, racial discrimination [including Zionism] and *apartheid* . . . The present resolution, whose provisions are related to the annexed Convention, shall always be published together with it."

It should be noticed that the type of struggle reserved from the application of the Convention is wider than that waged by a national liberation movement, and opens the door to any act of terrorism against an internationally protected person by any movement claiming to be engaged in a struggle for self-determination "against colonialism, alien domination [or] foreign occupation." Although this was not officially put forward on behalf of the Iranians who seized the

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34. 13 I.L.M. 41.

35. Res. 3034 (XXVII).

36. Res. 3379 (XXX).

37. Res. 3166 (XXVIII).

United States Embassy in Tehran in 1979, it did form part of their propaganda campaign. In fact, Iran was a party to this Convention, and had even signed the Protocol accepting the jurisdiction of the World Court in relation to disputes connected therewith. The seizure of the Embassy and the consequent attitude of the Iranian Government,<sup>38</sup> accompanied by its refusal to abide by the decisions of the Security Council or of the World Court, shows how artificial it is to pin any hope upon agreements of this kind or upon action through the United Nations in dealing with terrorism, particularly if the act involved can be expressed as part of an ideological struggle against a western power. The failure of the Iranian government to abide by its obligations or to observe any international decision in this case justifies the ultimate decision by the United States to attempt to effect an Entebbe-like rescue, regardless of the fact that the Court, in what everybody knew would be an unobserved decision, called upon the parties to do nothing to aggravate the situation.<sup>39</sup>

The only other major issue in relation to terrorism with which the United Nations has purported to deal relates to the taking of hostages, an action which is even forbidden in time of armed conflict.<sup>40</sup> In 1979 the General Assembly adopted without vote an International Convention against the Taking of Hostages,<sup>41</sup> declaring that "any person who seizes or detains and threatens to kill, to injure or to continue to detain another person (hereinafter referred to as the 'hostage') in order to compel a third party, namely, a State, an international intergovernmental organization, a natural or juridical person, or a group of persons, to do or abstain from doing any act as an explicit or implicit condition for the release of the hostage commits the offence of taking of hostages ('hostage-taking') within the meaning of the Convention." The Convention does not apply "where the offence is committed within a single State, the hostage and the alleged offender are nationals of that State and the alleged offender is found in the territory of that State," so it would not apply if, for example, a member of the Irish Republican Army or the Ulster Defence Association took British nationals hostage within the United Kingdom. By including national and juridical and groups of

38. See, e.g., Green, *The Tehran Embassy Incident - Legal Aspects*, (1980), 19 *Archiv des Völkerrechts* 1980, 1; *Case concerning U.S. Diplomats and Consular Staff in Tehran* [1979] I.C.J. 7 (Interim Measures), [1980] I.C.J. 3 (Merits).

39. In its decision on the merits, the Court criticized the U.S. on this ground, 31, 33, 43.

40. See Protocol I, 1977, additional to the Geneva Conventions of 12 Aug. 1949 (16 I.L.M. 1391), Art. 75 (2)(c).

41. 18 I.L.M. 1457; see also, Creighton and Szabo, *Hostage-Taking*, (1979). By 31 Dec. 1981, only 16 states had become parties to the Convention.

persons, the Convention is, however, wide enough to apply to any act of private kidnapping in which the release of the victim depends on any form of ransom, provided more than one state is concerned, as, for example, by reason of the offender transporting his victim across a frontier.

Although the Preamble to the Convention "reaffirm[s] the principle of equal rights and self-determination," there is no reservation respecting hostage-takings allegedly effected in connection with a struggle for self-determination. On the other hand, any request for the extradition of a hostage-taker will be denied "if the requested State Party has substantial grounds for believing that the request for extradition . . . has been made for the purpose of prosecuting or punishing a person on account of his race, religion, nationality, ethnic origin or political opinion." Since there is no measuring rod to determine what constitutes 'substantial grounds', the success of the Convention rests solely on the good faith of the requested State in exercising its discretion, and if the offender has left the country of his act it may be presumed that he has sought refuge in a country sympathetic to him and so unlikely to acquiesce in an extradition request. True, the Convention makes provision for arbitration of disputes, but any state signing or ratifying the Convention may exclude the operation of this provision. In the absence of any international criminal court, therefore, the only teeth available as a result of this Convention is local criminal law.

In what appears to be an attempt to prevent any rescue attempt, it is expressly provided that "nothing in this Convention shall be construed as justifying the violation of the territorial integrity or political independence of a State in contravention of the Charter of the United Nations." This provision, however, may be regarded as merely a verbal affirmation of existing law, for if a rescue attempt were restricted, as were Entebbe and the abortive United States exercise in Iran, to the rescue of the hostages, with no threat to the political independence or territorial integrity of the country affected, and if the exercise lasted only so long as was necessary to effect the rescue, then it would not constitute a breach of the Convention, any more than the Israeli and United States operations were contrary to general international law or the Charter of the United Nations.

As recently as 1980, the General Assembly passed yet another Resolution

"unequivocally condemn[ing] all acts of international terrorism which endanger or take human lives or jeopardize fundamental freedoms; the continuation of repressive and terrorist acts by colon-

ial, racist and alien régimes in denying people their legitimate right to self-determination and independence and other human rights and fundamental freedoms; . . . urg[ing] all States, unilaterally and in cooperation with other States, as well as relevant United Nations organs, to contribute to the progressive elimination of the causes underlying international terrorism; call[ing] upon all States to fulfil their obligations under international law, to refrain from organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another State, or acquiescing in organized activities within their territory directed towards the commission of such acts; . . . invit[ing] all States to take all appropriate measures at the national level with a view to the speedy and final elimination of the problem of international terrorism . . . ; . . . recogniz[ing] that, in order to contribute to the elimination of the causes and the problem of international terrorism, both the General Assembly and the Security Council should pay special attention to all situations, including, *inter alia*, colonialism, racism and situations involving alien occupation, that may give rise to international terrorism and may endanger international peace and security, with a view to the application where feasible and necessary, of the relevant provisions of the Charter of the United Nations, including Chapter VII thereof,"<sup>42</sup>

concerning the application of enforcement measures. This Resolution was carried by 118 to nil, with 22 abstentions.

So long as the United Nations raises the issues of self-determination and national liberation to the level of its 'tablets of stone' and pays more attention to causes of, than the acts of terrorism, there is little real value that can come from the documents likely to emanate from that Organization. In fact, the concern with national liberation has reached such levels that even aggressive acts carried out in its name are expressly excluded by Article 7 from the Definition of Aggression adopted in 1974.<sup>43</sup> It is clear, therefore, that, so long as political rivalries and ideologies remain as they are, any effective action against terrorism on the international level will come from bilateral arrangements or agreements among the members of regional groupings. Of these, the most important is the Council of Europe's Convention on the Suppression of Terrorism which came into force in 1977.<sup>44</sup> Despite the common political outlook of the parties, both Ireland and Malta refused to sign this Convention, while some of those accepting it did so only with reservations, primarily with respect to any offence condemned by the Convention as terrorism

42. Res. 34/145.

43. Res. 3314 (XXIX).

44. 15 I.L.M. 1272.

"which it considers to be a political offence, an offence connected with a political offence or an offence inspired by political motives." Such reservations have been made by Italy, Norway and Portugal,<sup>45</sup> and in 1979 the European Communities expressly recognized<sup>46</sup> the right to make such a reservation precluding the extradition of offenders, thus giving sanction to the parties to exclude any terrorist act that they please, although they are under an obligation to submit every such case without exception to local prosecution. In the case of France, the reservation has been expressed differently in view of the fact that, by its Constitution, "Anyone persecuted on account of his action for the cause of liberty has the right to asylum on the territory of the Republic."

Clearly the entire value of the Convention rests on the good faith of its parties, and this, as shown by the Irish non-acceptance, is affected by its own political sympathies. Since, unlike the other conventions relating to terrorism, the European Convention is directed against terrorism as such, it is worth noting how it defines terrorism: "For the purpose of extradition between Contracting States, none of the following offences shall be regarded as a political offence or as an offence connected with a political offence or as an offence inspired by political motives," acts falling within the Hague and Montreal Conventions on Hijacking or the Convention on Internationally Protected Persons, "an offence involving kidnapping, the taking of a hostage or serious unlawful detention [or] an offence involving the use of a bomb, grenade, rocket, automatic firearm or letter or parcel bomb if this use endangers persons." Apparently, therefore, the use of a non-automatic firearm to the same end would not constitute terrorism under the Convention. It might well be argued that this differentiation is not really significant in view of the reservations that have been made and are permitted to be made, which would appear to go to the very root of the Convention and be, as such, contrary to the whole tenor thereof.<sup>47</sup>

If terrorism is to be dealt with on an international level,<sup>48</sup> it would seem that all attempts to secure universal agreement must be abandoned, other than as expressions of a moral conviction that 'motherhood' is a good thing. On the regional level, an agreement can only be

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45. 16 *id.*, 1329.

46. 19 *id.*, 325.

47. Cf. Vienna Convention on the Law of Treaties, 1969 (8 *ibid.* 679), Art. 19(c), which seeks to forbid reservations "incompatible with the object and purpose of the treaty."

48. For a fuller discussion of *International Crimes and the Legal Process*, see Green, (1980) 29 *Int'l & Comp. L.Q.*, 566.

effective among states which have a common outlook as to the rule of law and the need to prevent and suppress terrorist acts whenever they occur. This means that there is no room for exceptions like that provided in the name of national liberation or political motivation. The act must be condemned and dealt with by whoever commits it and for whatever purpose. Sympathy with the actor may result in mitigation of punishment, but it must not be allowed to create exemption from responsibility. It must be recognized, however, that agreements of whatever kind are not likely to prevent terrorism. At most they can prescribe the treatment to be accorded after the terrorist act has taken place. Prevention, perhaps, depends upon the willingness of a group of states to act in unison swiftly and severely against acts of terrorism, whatever their motivation, when they occur in territories under their control, in order to demonstrate to terrorists that their act will no longer achieve its purpose, whether this be publicity or a concession. Just as the NATO Powers have created a joint command and the United Nations its Emergency Forces, so those who wish to suppress and punish terrorism must be prepared to create a joint international force able to act effectively and immediately and, if necessary, ruthlessly whenever terrorism occurs. If this means that innocent lives, including those of hostages, may be lost, so be it. Many of the terrorist groups have proclaimed that they are at war with the existing political and social way of life of individual states<sup>49</sup> and of western democracy itself.<sup>50</sup> In war, lives are lost and democratic rights restricted. If the principle and the rule of law are to be upheld, and if the world is to be made less prone to terrorism in the future, losses may have to be accepted at the present time.

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49. See *The Times* (London), 13 Jun. 1980, re Libyan support for the I.R.A.; see also, statement by I.R.A. in Red Brigades publication, *ControInformazione*, Nov. 1978, cf. Sterling, *supra*, note 20 at 151.

50. See Demaris, *Brothers in Blood* (1977), at 184; see also, communiqué by the Struggle Against World Imperialism Organization, cited by Heren in 'Terrorism: Myth and Reality', *The Times* (London), 22 Oct. 1977.